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CHAPTER 5

Foreign Relations

A. LITIGATION INVOLVING FOREIGN RELATIONS, NATIONAL SECURITY, AND FOREIGN POLICY ISSUES

Klieman v. Palestinian Authority

On February 15, 2019, the United States filed a brief in response to the court's order in *Klieman v. Palestinian Authority*, No. 15-7034, in the U.S. Court of Appeals for the D.C. Circuit. The case involves the question of personal jurisdiction over the Palestinian Authority ("PA"), including under the Anti-Terrorism Clarification Act of 2018, Pub. L. No. 115-253, 132 Stat. 3183 (2018) ("ATCA"). Excerpts follow from the February 15, 2019 U.S. brief (with most footnotes omitted). The brief is available at https://www.state.gov/digest-of-united-states-practice-in-international-law/.

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The United States files this response to the Court's February 6, 2019 Order to inform the Court that neither the "accepts" nor "continues to maintain" provisions of Section 4 of the Anti-Terrorism Clarification Act of 2018 (ATCA), have been satisfied. Section 4 thus does not operate to "deem" defendants to have consented to personal jurisdiction in this case, and this Court therefore need not address Section 4's constitutionality.

The United States respectfully submits that the Court should resolve the antecedent issue of whether the ATCA's factual predicates are satisfied before requesting the United States' views on the constitutional issue. …

1. Section 4 of the ATCA, Pub. L. No. 115-253, codified at 18 U.S.C. § 2334(e), provides that a defendant will be "deemed to have consented to personal jurisdiction" in a civil Anti-Terrorism Act case if, after the date that is 120 days after the enactment of the statute (i.e.,

January 31, 2019), the defendant (1) accepts specified forms of assistance under the Foreign Assistance Act of 1961, or, (2) "in the case of a defendant benefiting from a waiver or suspension of section 1003 of the Anti-Terrorism Act of 1987 (22 U.S.C. § 5202)," the defendant "continues to maintain" or "establishes" "any office, headquarters, premises, or other facilities or establishments within the jurisdiction of the United States." 18 U.S.C. § 2334(e)(1).

2. On December 19, 2018, the Court invited the United States to file an amicus brief addressing whether Section 4 of ATCA is constitutional. The Court's order directed the United States to "assume that the 'accepts' and or 'continues to maintain' provisions of Section 4 will be satisfied 'after the date that is 120 days after the date of enactment'" of the ATCA. *See* Dec. 19, 2018 Order.

On February 6, 2019, the Court instructed the parties to file supplemental briefs "updating their views on the current applicability of Section 4," including whether the 'accepts' and/or 'continues to maintain' provisions have been satisfied." *See* Feb. 6, 2019 Order. The Court also instructed the parties' supplemental briefs to address the views presented in the United States' amicus brief, due February 27, 2019. *Id.*

3. The United States writes to inform the Court that, as of February 1, 2019, and continuing to the present, the "accepts" and "continues to maintain" provisions of the ATCA are not satisfied.

First, as of February 1, 2019 and at all times since, defendants have not accepted foreign assistance provided under the legal authorities specified in Section 4. On December 26, 2018, the "Government of Palestine," which the United States understands to be speaking on behalf of defendants,[1] sent a letter to the State Department explicitly declining to accept the forms of foreign assistance enumerated in Section 4. *See* Ex. 1, Letter from Rami Hamdallah to U.S. Dep't of State (Dec. 26, 2018). Consistent with this request, the State Department ended all such assistance to the Palestinian Authority prior to February 1, 2019. *See* Ex. 2, Letter from the U.S. Dep't of State to Rami Hamdallah (Jan. 29, 2019). The State Department does not provide assistance under any of the foreign assistance authorities enumerated in section 4 to the Palestine Liberation Organization (PLO). Section 4's "accepts" provision is thus not satisfied.

Second, defendants do not currently "benefit" from a waiver of section 1003 of the Anti-Terrorism Act of 1987, including to "continue to maintain" "any office, headquarters, premises, or other facilities or establishments within the jurisdiction of the United States" pursuant to such a waiver. 22 U.S.C. § 2334(e)(1)(B). Section 1003 makes it unlawful for the PLO "or any of its constituent groups" to "establish or maintain an office, headquarters, premises, or other facilities or establishments within the jurisdiction of the United States." 22 U.S.C. § 5202. The Executive Branch has historically issued waivers of section 1003 on a six-month basis, permitting the PLO to maintain an office of the General Delegation of the PLO in Washington, DC. *See, e.g.*, Ex. 3, May 8, 2017 Waiver. The last waiver issued by the State Department expired in 2017, however, *id.*, and the State Department announced in 2018 that in the absence of a waiver, the PLO's office in Washington D.C. must close because "the PLO has not taken steps to advance the start of direct and meaningful negotiations with Israel," and has "refused to engage with the U.S. government with respect to peace efforts and otherwise." There is no waiver of section 1003 currently in effect, and the PLO's Washington office closed as of October 10, 2018. *See* Ex. 5,

[1] While the United States does not recognize a Palestinian state, the Department of State recognizes this letter as having been sent by the PA. Assistance is not provided to the PLO.

Letter from U.S. Dep't of State to Chief Representative, General Delegation of the PLO (Sept. 10, 2018).

The PLO continues to maintain its United Nations Observer Mission in New York. The PLO's maintenance of that office, however, could not fall within the terms of the ATCA, as there is no current waiver of section 1003. Since the enactment of section 1003, courts have held that its prohibition "does not apply … to the PLO's Mission in New York." *See, e.g.*, *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro*, 937 F.2d 44, 46 (2d Cir. 1991); *United States v. PLO*, 695 F. Supp. 1456, 1464–71 (S.D.N.Y. 1988). The Executive Branch does not issue waivers of section 1003 to permit the PLO to maintain its New York Observer Mission. Section 4's "continues to maintain" provision is thus not satisfied.

In sum, as of February 1, 2019 and since that date, defendants have not accepted any of the foreign assistance provided under the authorities enumerated in Section 4, and they do not currently "benefit" from a waiver of section 1003 of the Anti-Terrorism Act of 1987, including to maintain an office in the United States pursuant to such a waiver. Based on the facts of which the government is aware, there is no need for a remand to the district court. This Court can determine that the ATCA's statutory predicates are not satisfied, and thus Section 4 does not operate to "deem" the PA/PLO to have consented to personal jurisdiction in this case.

Accordingly, this Court need not address the constitutionality of the statute. …The Court should particularly avoid unnecessarily addressing the constitutional issue here, as it arises in the context of the conduct of foreign relations. The United States respectfully submits that the Court should resolve the antecedent issue of whether the ATCA's factual predicates are satisfied before requesting briefing on the constitutionality of Section 4 of the ATCA.

* * * *

On March 13, 2019, the United States filed an additional brief in *Klieman* in response to the court's order to address the constitutionality of the ATCA, which the February brief did not address. Excerpts follow from the March 13, 2019 U.S. brief (with most footnotes and record citations omitted). The brief is available at https://www.state.gov/digest-of-united-states-practice-in-international-law/.

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III. Section 4 is Constitutional

A. Congress May Treat the Palestinian Authority's or Palestine Liberation Organization's Consent as a Lawful Basis for Exercising Personal Jurisdiction Under Section 4

This Court held in *Livnat v. Palestinian Authority*, 851 F.3d 45, 55 (D.C. Cir. 2017), that the Palestinian Authority has due process rights, and that a federal court must establish personal jurisdiction over it consistent with the Fifth Amendment. The United States assumes for purposes of this brief that the Palestine Liberation Organization also has due process rights. The Supreme Court has long recognized, however, that "[b]ecause the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived." *Bauxites*, 456 U.S. at 703.

There are a "variety of legal arrangements" through which a defendant may consent to a court's exercise of jurisdiction in the absence of minimum contacts. *Id.*; *see also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1985). A defendant may consent by, for example, entering a contract and "agree[ing] in advance to submit to the jurisdiction of a given court," *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 316 (1964), or through "the voluntary use of certain state procedures," *Bauxites*, 456 U.S. at 704. As long as a defendant's consent is "knowing and voluntary," the court's exercise of jurisdiction is consistent with due process. *See Wellness Int'l Network v. Sharif*, 135 S. Ct. 1932, 1948 (2015); *Burger King*, 471 U.S. at 472 n.14.

1. Section 4 is one such "legal arrangement" through which a defendant can consent to personal jurisdiction. *See Bauxites*, 456 U.S. at 703. Section 4 sets out expressly what actions will cause a defendant to be "deemed to have consented" to personal jurisdiction in civil cases under the ATA of 1992 if those actions are taken after 120 days after the enactment of Section 4. 18 U.S.C. § 2334(e). Since the ATCA's enactment, the Palestinian Authority and Palestine Liberation Organization have "know[n]" what actions will be deemed consent, and have had the opportunity to "voluntarily" choose whether or not to continue such actions and thereby consent to jurisdiction in the courts of the United States for civil actions under the ATA of 1992. *See Wellness Int'l Network*, 135 S. Ct. at 1948.

Section 4 thus operates similarly to other legal arrangements through which a defendant may validly consent to personal jurisdiction. *See Bauxites*, 456 U.S. at 703. For example, a defendant that consents by contract to suit in a particular forum is aware in advance of the forum in which it may be subject to suit, and the causes of action for which it may be sued: those arising out of the contract. The defendant can "structure [its] primary conduct with some minimum assurance as to where that conduct will and will not render [it] liable to suit," consistent with the Due Process Clause. *Daimler*, 571 U.S. at 139 (quoting *Burger King*, 471 U.S. at 472); *see also id.* at 137 (discussing predictability and personal-jurisdiction rules). Similarly, Section 4 sets out expressly what actions will be deemed consent to personal jurisdiction in the courts of the United States, and it specifies the cause of action for which the defendant will be deemed to have consented to personal jurisdiction: civil cases under the ATA of 1992. The 120-day implementation period also gives defendants fair warning that particular conduct will subject them to personal jurisdiction, and a reasonable period of time to structure their conduct accordingly.

2. Furthermore, "Congress passed, and the President signed, [the ATCA] in furtherance of their stance on a matter of foreign policy," a "realm [that] warrants respectful review by courts." *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1317 (2016). Specifically, Congress enacted, and the President signed, Section 4 to provide a meaningful response to international terrorism, and the political branches acted against an extensive backdrop of statutes relating to the terms under which the Palestine Liberation Organization may operate in the United States and the Palestinian Authority may receive foreign assistance.

The civil-liability provision of the ATA of 1992 is intended "to develop a comprehensive legal response to international terrorism." 1992 House Report at 5. Congress found in the ATCA, however, that because courts had determined that the Palestinian Authority and Palestine Liberation Organization were not subject to general personal jurisdiction in the United States, the goals of the ATA of 1992 were not being realized. *See* H.R. Rep. No. 115-858, at 6. Congress thus determined that it was necessary to enact Section 4 so that the ATA of 1992's civil-liability

provision could function effectively to "halt, deter, and disrupt international terrorism." *Id.* at 7–8; *see also id.* at 2–3.

The actions Congress selected in Section 4 to "deem" consent to personal jurisdiction are consistent with this legislative purpose. Defendants are *sui generis* foreign entities that exercise governmental power but have not been recognized as a sovereign government by the Executive. Their right to operate within the United States and their receipt of foreign assistance is dependent on the coordinated judgments of the political branches. As a matter of historical practice, the political branches have long imposed conditions on these benefits based on the same concerns that motivated enactment of this statute, namely concerns about support for acts of terrorism by the Palestinian Authority and Palestine Liberation Organization. …

In this context, it was reasonable and consistent with the Fifth Amendment for Congress and the Executive to determine that the Palestine Liberation Organization's maintenance of an office in this country after a waiver of section 1003, or the Palestinian Authority's continued receipt of certain foreign assistance, should be "deemed" consent to personal jurisdiction in civil cases under the ATA of 1992, the purpose for which is to deter terrorism. *See* 2018 House Report at 7 (explaining that "Congress has repeatedly tied the[Palestinian Authority and Palestine Liberation Organization's] continued receipt of these privileges to their adherence to their commitment to renounce terrorism," and that it is appropriate to deem the continued acceptance of these benefits to be "consent to jurisdiction in cases in which a person's terrorist acts injure or kill U.S. nationals").

3. Defendants' contrary arguments are not persuasive. Defendants insist that they are not "at home" in the United States. … But the "at home" test for general jurisdiction is relevant only in the absence of consent. *See Daimler*, 571 U.S. at 129; *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 927–28 (2011). A forum's ability to exercise jurisdiction by consent is separate and apart from the forum's ability to exercise general or "specific jurisdiction over an out-of-state defendant who has not consented to suit there." *Burger King*, 471 U.S. at 472.

Defendants also contend that any consent to jurisdiction under the ATCA cannot be "'voluntary.'" … But the ATCA explicitly sets out which actions will be "deemed" consent, and it provides advanced notice to defendants so that they can choose whether or not to continue those actions. Once a defendant is on notice, the defendant's choice to continue receiving foreign assistance under the specified authorities, or choice to continue to maintain an office pursuant to an Executive Branch waiver of section 1003, is the "voluntary act" that manifests consent to jurisdiction. …

4. The United States takes no position on whether a State may enact a statute deeming certain conduct, such as registering to do business in the State, to be consent to jurisdiction, and this Court need not address that question to decide the constitutionality of Section 4, which arises in a unique foreign affairs context. … As discussed above, this case involves jurisdiction in a limited set of anti-terrorism cases against *sui generis* foreign non-sovereign entities that have no right to operate in the United States. The United States does not recognize a Palestinian state, and yet the Palestine Liberation Organization wishes to operate an office here to conduct public diplomacy and public advocacy on behalf of an entity that holds itself out as a foreign government. In this foreign affairs context, in contrast to the limited and mutually exclusive sovereignty of the several states, Congress may deem certain actions of defendants like the Palestinian Authority and the Palestine Liberation Organization to be consent to personal jurisdiction in the United States, even if a State cannot enact similar legislation. *See J. McIntyre*

Machinery, Ltd. v. Nicastro, 564 U.S. 873, 884 (2011) (plurality op.) (explaining that "personal jurisdiction requires a forum-by-forum, or sovereign- by-sovereign, analysis").

Section 4 also differs meaningfully from a state statute deeming registration or other processes to be consent to jurisdiction. A state registration-by-consent statute could make a defendant "amenable to suit" in the forum, "on any claim for relief," simply by virtue of doing business in the forum. *See Goodyear*, 564 U.S. at 929; *see also Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 636–38, 640 (2d Cir. 2016). Section 4, by contrast, grants jurisdiction over specified civil actions under a single federal statute, and only if the defendant performs specified actions under the ATCA. Those civil actions also have a nexus to conduct by the Palestinian Authority and the Palestine Liberation Organization that has historically been the basis for restrictions on assistance (in the case of the Palestinian Authority) or operating in the United States (in the case of the Palestine Liberation Organization): engaging in or providing support for terrorist activity. Section 4 is thus substantially narrower than State consent-by-registration statutes, and poses less risk of unfair surprise. Moreover, in light of this foreign affairs and national security context, Section 4 is entitled to deference in a way that state consent-by-registration statutes are not. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 35–36 (2010) (discussing deference owed to political branches when "sensitive interests in national security and foreign affairs [are] at stake"). This Court need not, and should not, address state consent-by-registration statutes in order to find Section 4 constitutional.

B. Section 4 Does Not Impose an Unconstitutional Condition

The Court's order inviting the United States to file an amicus brief also directed the United States to address "defendants' argument that Section 4 of the Act violates the unconstitutional conditions doctrine." Neither this Court nor the Supreme Court has applied an unconstitutional conditions doctrine to a statute that deems certain actions taken by a defendant to be consent to personal jurisdiction for purposes of the Fifth Amendment's Due Process Clause. And no case has addressed such a statute with respect to these *sui generis* defendants. Assuming that some form of unconstitutional conditions doctrine applies in this context, however, it is satisfied here.

In applying the unconstitutional conditions doctrine in the context of the Takings Clause, the Supreme Court has held that a condition on the grant of a land use permit or other permission that would constitute an outright taking if imposed directly is permissible if it furthers the end advanced as the justification for the prohibition. *See Dolan v. City of Tigard*, 512 U.S. 374, 385–86, 391 (1994) (determining whether the state interest has a "nexus" and "rough proportionality" to the imposed condition); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837–38 (1987) (same). And in the First Amendment context, in reviewing government funding conditions applied to domestic entities with constitutional rights, Congress is permitted to impose "conditions that define the limits of [a] government spending program" and thereby "specify the activities Congress wants to subsidize." *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214 (2013). "[I]f a party objects" to the conditions, its "recourse is to decline the funds." *Id.* A condition becomes unconstitutional only where it "seek[s] to leverage funding" to burden First Amendment-protected activity "outside the contours of the program itself." *Id.* at 214–15.

Regardless of the analytical framework, if any, that applies in this context, Section 4 does not impose an unconstitutional condition. The Palestine Liberation Organization is presumptively prohibited from establishing or maintaining an office in the United States based on Congress's determination that it is "a terrorist organization and a threat to the interests of the

United States, its allies, and to international law." 22 U.S.C. §§ 5201(b), 5202. Waiver of this prohibition has historically been contingent on the Executive Branch's determination that certain conditions are met, including that the Palestine Liberation Organization have renounced terrorism and committed to peace in the Middle East. *See, e.g.*, Middle East Peace Facilitation Act of 1994, Pub. L. No. 103-236, § 583, 108 Stat. 488, 488–89; Middle East Peace Facilitation Act of 1996, Pub. L. No. 104-107, § 604, (b), 110 Stat. 755, 756–57; Department of State, Foreign Operations, and Related Programs Appropriations Act, 2018, div. K, Pub. L. No. 115-141, § 7041(m)(2)(B). To the extent the Executive Branch permits the Palestine Liberation Organization to operate in the United States for the purposes of advancing United States efforts to promote peace between Israel and the Palestinians, it is reasonable and proportional for the United States to condition the Palestine Liberation Organization's exercise of the waiver on its consent to personal jurisdiction in cases that allege they have provided material support for terrorist attacks injuring U.S. persons. *See Dolan*, 512 U.S. at 391.

Similarly, the Palestinian Authority's receipt of foreign assistance is subject to restrictions related to international terrorism, and dependent on the judgments of the political branches with respect to the Palestinian Authority's actions, including prior judgments that such assistance was not being used to support terrorism. *See, e.g.*, 2019 Appropriations Act, div. F, Pub. L. No. 116-6, § 7039(b) (requiring Secretary of State to ensure that "assistance is not provided to or through any individual, private or government entity that the Secretary knows or has reason to believe advocates, plans, sponsors, engages in, or has engaged in, terrorist activity"); *id.* § 7040(a), (b) (prohibiting funds to the Palestinian Authority unless the President certifies that it is "important to the national security interest of the United States"); *id.* § 7041(k)(1) (requiring Secretary of State, before providing assistance to the West Bank and Gaza, to certify the assistance is for specified purposes, including to "advance Middle East peace" or "improve security in the region"). The assistance provided under the authorities in Section 4 likewise has historically served counterterrorism purposes, including by improving the capacity of Palestinian Authority security forces and police to combat terrorism. If the Executive Branch has made the required determinations and provided assistance to the Palestinian Authority under the specified authorities, it is within "the contours" of the programs for Congress to also require that, if the Palestinian Authority knowingly accepts that assistance, it must also consent to personal jurisdiction in cases alleging it has provided material support for terrorism. *Cf. Alliance for Open Society Int'l*, 570 U.S. at 214–15; *see also* 2018 House Report at 7.

In sum, to the extent Section 4 imposes conditions on defendants for purposes of an unconstitutional conditions doctrine, those conditions are constitutional because they relate to the terms under which the Palestinian Authority and Palestine Liberation Organization may receive foreign assistance or operate in the United States—benefits that have long been subject to conditions set by the political branches in relation to those entities' renouncement of terrorism. Congress may appropriately impose such conditions in the foreign affairs context with respect to entities such as defendants here, even assuming Congress could not set the same conditions with respect to domestic entities. In this particular statutory context, it is not an unconstitutional condition for Congress to determine that the Palestinian Authority's acceptance of foreign assistance from the United States, or the Palestine Liberation Organization's establishment or maintenance of an office in the United States pursuant to a waiver of the ATA of 1987, should be deemed consent to personal jurisdiction in civil cases under the ATA of 1992, the purpose of which is to meaningfully combat terrorism.

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The D.C. Circuit Court decided the case on May 14, 2019, concluding, *inter alia*, that none of the factual predicates for jurisdiction under the statute had been triggered during the relevant time period and declining to reach the constitutional questions. *Estate of Klieman v. Palestinian Auth.*, 923 F.3d 1115 (D.C. Cir. 2019). On December 5, 2019, the Estate of Esther Klieman filed a petition in the U.S. Supreme Court for a writ of certiorari.[*]

B. ALIEN TORT STATUTE AND TORTURE VICTIM PROTECTION ACT

1. Overview

The Alien Tort Statute ("ATS"), sometimes referred to as the Alien Tort Claims Act ("ATCA"), was enacted as part of the First Judiciary Act in 1789 and is codified at 28 U.S.C. § 1350. It provides that U.S. federal district courts "shall have original jurisdiction of any civil action by an alien for tort only, committed in violation of the law of nations or a treaty of the United States." In 2004 the Supreme Court held that the ATS is "in terms only jurisdictional" but that, in enacting the ATS in 1789, Congress intended to "enable federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law." *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). By its terms, this statutory basis for suit is available only to aliens.

The Torture Victim Protection Act ("TVPA"), which was enacted in 1992, Pub. L. No. 102-256, 106 Stat. 73, appears as a note to 28 U.S.C. § 1350. It provides a cause of action in federal courts against "[a]n individual … [acting] under actual or apparent authority, or color of law, of any foreign nation" for individuals, including U.S. nationals, for torture and/or extrajudicial killing. The TVPA contains an exhaustion requirement and a ten-year statute of limitations.

2. Al-Tamimi

As discussed in *Digest 2018* at 144-46 and *Digest 2017* at 131-35, the United States filed briefs in the district court and on appeal in *Al-Tamimi v. Adelson*, a case invoking the TVPA and ATS. The U.S. Court of Appeals for the D.C. Circuit issued its opinion in the case on February 19, 2019, reversing the lower court's decision that it lacked jurisdiction because the case involved political questions. The opinion is discussed in the political question section of this chapter, C.1. *infra*.

[*] Editor's note: On April 27, 2020 the Supreme Court granted the petition for certiorari, vacated the judgment and remanded the case for further consideration in light of the Promoting Security and Justice for Victims of Terrorism Act of 2019, Pub. L. No. 116–94, div. J, tit. IX, § 903, 133 Stat. 3082.

C. POLITICAL QUESTION DOCTRINE, COMITY, AND *FORUM NON CONVENIENS*

Political Question: *Al-Tamimi*

On February 19, 2019, the Court of Appeals for the D.C. Circuit issued its decision in *Al-Tamimi v. Adelson*, 916 F.3d 1 (D.C. Cir. 2019), a case alleging that defendants conspired to support Israeli settlements and also eviction of, and crimes against, Palestinians in disputed territory (defined as the West Bank, including East Jerusalem, and the Gaza Strip). As discussed in *Digest 2018* at 165-68 and *Digest 2017* at 155-61, the U.S. briefs in the district court and on appeal in *Al-Tamimi* discuss the political question doctrine (as well as the TVPA and ATS). The Court of Appeals reversed the lower court's decision that it lacked jurisdiction because the case involved political questions, but did not discuss in great depth the TVPA or ATS. Excerpts follow from the court's opinion.

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The political question doctrine arises from the constitutional principle of separation of powers. The "doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). In deciding whether a controversy presents a political question, "[w]e must conduct 'a discriminating analysis of the particular question posed' in the 'specific case.'" *bin Ali Jaber*, 861 F.3d at 245 (quoting *Baker*, 369 U.S. at 211). Abstraction and generality do not suffice. To be precise, we follow a three-step process. First, we identify the issues raised by the plaintiffs' complaint. Next, we use the six *Baker* factors to determine whether any issue presents a political question. *See El-Shifa*, 607 F.3d at 840–42. Finally, we decide whether the plaintiffs' claims can be resolved without considering any political question, to the extent one or more is presented. Indeed, the political question doctrine mandates dismissal only if a political question is "inextricable from the case." *Baker*, 369 U.S. at 217; *see also U.S. Dep't of Commerce v. Montana*, 503 U.S. 442, 456 (1992); *Davis v. Bandemer*, 478 U.S. 109, 122 (1986). In other words, "the political question doctrine is a limited and narrow exception to federal court jurisdiction." *Starr*, 910 F.3d at 533 (citing *United States v. Munoz-Flores*, 495 U.S. 385, 396 (1990)). A court cannot "avoid [its] responsibility" to enforce a specific statutory right "merely 'because the issues have political implications.'" *Zivotofsky ex rel. Zivotofsky v. Clinton* (*Zivotofsky I*), 566 U.S. 189, 196 (2012) (quoting *INS v. Chadha*, 462 U.S. 919, 943 (1983)).

1. Issues Raised by Plaintiffs' Complaint

As noted earlier, the district court concluded that the plaintiffs' complaint raises five political questions:

> (1) the limits of state sovereignty in foreign territories where boundaries have been disputed since at least 1967; (2) the rights of private landowners in those territories; (3) the legality of Israeli settlements in the West Bank, Gaza, and East Jerusalem; (4) whether the actions of Israeli soldiers and private settlers in the disputed territories

> constitute genocide and ethnic cleansing … [and (5)] whether contributing funds to or performing services in these settlements is inherently unlawful and tortious.

Al-Tamimi, 264 F. Supp. 3d at 78. …

In Count I the plaintiffs allege that the defendants engaged in a civil conspiracy to expel all non-Jews from the disputed territory. The elements of civil conspiracy are:

> (1) an agreement between two or more persons; (2) to participate in an unlawful act, or a lawful act in an unlawful manner; (3) an injury caused by an unlawful overt act performed by one of the parties to the agreement; (4) which overt act was done pursuant to and in furtherance of the common scheme.

Halberstam v. Welch, 705 F.2d 472, 477 (D.C. Cir. 1983). Count I charges as the requisite "unlawful acts" genocide and theft and destruction of private property. To determine whether Israeli settlers committed genocide, we must answer only one of the seven political questions identified by the district court and the defendants—Question #4 (Do the Israeli settlers' actions in the disputed territory constitute genocide and ethnic cleansing?). And to determine whether Israeli settlers engaged in theft and destruction of private property, we must answer only Question #2 (What are the rights of private landowners in the disputed territory?).

In Count II, the plaintiffs allege that the defendants committed war crimes, crimes against humanity and genocide in violation of the law of nations. Specifically, they allege the defendants committed "murder, ill treatment of a civilian population in occupied territory, pillage, destruction of private property, and persecution based upon religious or racial grounds." And in Count III, the plaintiffs allege that the defendants aided and abetted the crimes alleged in Count II. Counts II and III therefore require the court to determine whether Israeli settlers committed murder, pillage, destruction of private property, persecution based upon religious or racial grounds or ill-treatment of a civilian population in occupied territory. To determine whether Palestinians constitute a "civilian population in occupied territory," the court must answer only Question #1 (What are the limits of state sovereignty in the West Bank, Gaza and East Jerusalem?). To determine whether the Israeli settlers pillaged or destroyed private property, the court must answer only Question #2 (What are the rights of private landowners in the disputed territory?). And to determine whether Israeli settlers murdered or persecuted Palestinians based upon religious or racial grounds, the court must answer only Question #4 (Do the actions of Israeli settlers in the disputed territory constitute genocide and ethnic cleansing?). Finally, Count IV alleges that the defendants committed aggravated and ongoing trespass. To resolve Count IV, the court must answer only Question #2 (What are the rights of private landowners in the disputed territory?).

Thus, only three of the seven purported political questions identified by the district court or the defendants are questions— political or otherwise—potentially presented by this case. Of the three, two (Questions #1 and #2) can be reduced to a single question: *who has sovereignty over the disputed territory*? The other (Question #4) can be restated as: *are Israeli settlers committing genocide*? A close reading of the two-hundred-page complaint confirms that these are the only two potential political questions raised by the plaintiffs' claims. To determine if these two questions are jurisdiction-stripping political questions, we turn to the *Baker* factors.

2. Application of *Baker* Factors

a. First Two Factors

The first *Baker* factor requires us to determine whether there is a textually demonstrable commitment of the question to either the Executive Branch or the Legislative Branch. *Baker*, 369 U.S. at 217. The second *Baker* factor requires us to determine whether there are judicially manageable standards to answer the question. *Id.* Together, these factors often dictate that a case touching on foreign affairs presents a political question. *See Haig v. Agee*, 453 U.S. 280, 292 (1981) ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention."); *El-Shifa*, 607 F.3d at 841 ("Disputes involving foreign relations...are 'quintessential sources of political questions.'" (quoting *Bancoult v. McNamara*, 445 F.3d 427, 433 (D.C. Cir. 2006))). Indeed, the Constitution expressly commits certain foreign affairs questions to the Executive or the Legislature. *See* U.S. Const. art. I, § 8 (the Congress's power to "regulate Commerce with foreign Nations," "declare War," "raise and support Armies," "provide and maintain a Navy" and "make Rules for the Government and Regulation of the land and naval Forces"); U.S. Const. art. II, § 2 (the President's power to "make Treaties" and "appoint Ambassadors" and the President's role as "Commander in Chief of the Army and Navy of the United States"). Moreover, resolution of questions touching foreign relations "frequently turn[s] on standards that defy judicial application." *Baker*, 369 U.S. at 211. But not every case that involves foreign affairs is a political question. *Id.* ("[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."); *Hourani v. Mirtchev*, 796 F.3d 1, 9 (D.C. Cir. 2015) ("Adjudicating the lawfulness of those acts of a foreign sovereign that are subject to the United States' territorial jurisdiction … is not an issue that the Constitution entirely forbids the judiciary to entertain."); *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 758 F.3d 296, 313 (D.C. Cir. 2014) ("[W]e do not automatically decline to adjudicate legal questions if they may implicate foreign policy or national security."). How do we determine whether a case involving foreign affairs is a political question? Our en banc court has answered that question: policy choices are to be made by the political branches and purely legal issues are to be decided by the courts. *El Shifa*, 607 F.3d at 842 ("We have consistently held … that courts are not a forum for reconsidering the wisdom of discretionary decisions made by the political branches in the realm of foreign policy or national security. In this vein, we have distinguished between claims requiring us to decide whether taking military action was 'wise'—'a policy choice and value determination constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch'—and claims '[p]resenting purely legal issues' such as whether the government had legal authority to act." (alterations in original) (quoting *Campbell v. Clinton*, 203 F.3d 19, 40 (D.C. Cir. 2000) (Tatel, J., concurring))). This is the distinction on which this litigation turns.

The first potential political question presented—*who has sovereignty over the disputed territory*—plainly implicates foreign policy and thus is reserved to the political branches. As the Supreme Court has explained, in our constitutional system questions regarding the "legal and international status [of Jerusalem] are … committed to the Legislature and the Executive, not the Judiciary." *Zivotofsky ex rel. Zivotofsky v. Kerry* (*Zivotofsky II*), 135 S. Ct. 2076, 2081 (2015). What is true of Jerusalem specifically is true of the entirety of the disputed territory. In fact, the Executive Branch recently addressed the question *who has sovereignty over the disputed territory*. *See* Statement by President Trump on Jerusalem (Dec. 6, 2017), https://www.whitehouse.gov/briefings-statements/statement-president-trump-jerusalem/ ("We are not taking a position [on] any final status issues, including the specific boundaries of the Israeli sovereignty in Jerusalem, *or the resolution of contested borders*." (emphasis added)).

On the other hand, the second potential political question presented—*are Israeli settlers committing genocide*—is a purely legal issue. As noted earlier, one of the bases of the plaintiffs' complaint is the Alien Tort Statute. The ATS provides in part that "district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations." 28 U.S.C. § 1350. An ATS claim, then, incorporates the law of nations. And it is well settled that genocide violates the law of nations. *Simon v. Republic of Hungary*, 812 F.3d 127, 145 (D.C. Cir. 2016) ("[T]he relevant international-law violation for jurisdictional purposes is *genocide*."); *see also Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1401–02 (2018). Genocide has a legal definition. *See* United Nations Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9, 1948, 78 U.N.T.S. 277, 280 (defining genocide, in part, as "[k]illing members of [a national, ethnic, racial or religious group]" "with intent to destroy [the group], in whole or in part"). Thus, the ATS—by incorporating the law of nations and the definitions included therein—provides a judicially manageable standard to determine whether Israeli settlers are committing genocide. We recognize that the ATS "enable[s] federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law." *Sosa v. Alvarez- Machain*, 542 U.S. 692, 712 (2004). We are well able, however, to apply the standards enunciated by the Supreme Court to the facts of this case. The first two *Baker* factors, then, suggest that this case presents only one political question: *who has sovereignty over the disputed territory*.

b. The Four Prudential Factors

The last four *Baker* factors—the prudential factors—are closely related in that they are animated by the same principle: as a prudential matter, the Judiciary should be hesitant to conflict with the other two branches. *See Baker*, 369 U.S. at 217. Traditionally, the existence of one of the prudential factors indicates that a question is a political question. *Schneider*, 412 F.3d at 194 ("The *Baker* analysis lists the six factors in the disjunctive, not the conjunctive. To find a political question, we need only conclude that one factor is present, not all."). In its most recent discussion of the *Baker* factors, however, the Supreme Court did not discuss the prudential factors. *Zivotofsky I*, 566 U.S. at 195 ("We have explained that a controversy 'involves a political question … where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.'" (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993))). Because the Supreme Court "does not normally overturn, or dramatically limit, earlier authority *sub silentio*," we do not interpret the omission as eliminating the prudential factors. *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000). Nor can we say, however, that the omission was unintentional. *See Zivotofsky I*, 566 U.S. at 202–07 (Sotomayor, J., concurring in part and in the judgment) (commenting on majority opinion's omission of prudential factors); *id.* at 212 (Breyer, J., dissenting) (same); *cf. Harbury v. Hayden*, 522 F.3d 413, 418 (D.C. Cir. 2008) (calling first two factors "most important"). At the very least, *Zivotofsky I* suggests that, if the first two *Baker* factors are not present, more is required to create a political question than apparent inconsistency between a judicial decision and the position of another branch. *See* 566 U.S. at 194–201 (no political question notwithstanding Judiciary's decision that plaintiff's passport can list "Jerusalem, Israel" as his birthplace would appear inconsistent with Executive's decision—at that time—not to recognize Jerusalem as part of Israel).

In analyzing the prudential *Baker* factors, the official position of the Executive is highly relevant. The Executive is institutionally well-positioned to understand the foreign policy ramifications of the court's resolution of a potential political question. Accordingly, an Executive

Branch opinion regarding these ramifications is owed deference, no matter what form it takes. *See Hwang Geum Joo v. Japan*, 413 F.3d 45, 52 (D.C. Cir. 2005) (Executive offered opinion in Statement of Interest, opinion was "compelling" and rendered case nonjusticiable under political question doctrine"); *see also Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 62 (D.C. Cir. 2011) (Executive offered opinion in Statement of Interest and amicus briefs and court invited it to reassert concerns on remand), *vacated on other grounds*, 527 F. App'x 7, 7 (D.C. Cir. 2013); *cf. In re Papandreou*, 139 F.3d 247, 252 (D.C. Cir. 1998) (Executive offered opinion regarding Foreign Sovereign Immunities Act defense as amicus and court gave its "factual estimation" "substantial weight" but treated its "legal conclusions" as "no more authoritative than those of private litigants"). Here, the Department of Justice expressed its opinion that judicial resolution of the plaintiffs' complaint could create an inter-branch conflict because, "[g]iven the level of political and military support provided Israel by the American government, a judicial finding that the Israeli armed forces had committed the alleged offenses would 'implicitly condemn American foreign policy by suggesting that the [government's] support of Israel is wrongful.'" Gov't Appellee's Br. 16. This concern, although entitled to deference, is now moot as the plaintiffs have waived any theory of liability based on the conduct of the Israeli military. …

Ultimately, we believe that the court would create an interbranch conflict by deciding *who has sovereignty over the disputed territory*. By answering the question—regardless of the answer—the court would directly contradict the Executive, which has formally decided to take no position on the question. We do not believe, however, that the court would necessarily create an interbranch conflict by deciding *whether Israeli settlers are committing genocide*. A legal determination that Israeli settlers commit genocide in the disputed territory would not decide the ownership of the disputed territory and thus would not directly contradict any foreign policy choice. In light of the statutory grounds of plaintiffs' claims coupled with *Zivotofsky I*'s muteness regarding *Baker*'s four prudential factors, we believe that *whether Israeli settlers are committing genocide* is not a jurisdiction-stripping political question. Accordingly, although the question *who has sovereignty over the disputed territory* does present a "hands-off" political question, the question *whether Israeli settlers are committing genocide* does not.

* * * *

D. EXTRATERRITORIAL APPLICATION OF U.S. CONSTITUTION

1. *Hernandez*

As discussed in *Digest 2018* at 169, the Supreme Court invited a brief expressing the views of the United States in *Hernandez v. Mesa*, No. 17-1678, a case before the Supreme Court for the second time. *Hernandez* is a damages action against a U.S. Border Protection officer (Mesa) for the death of a Mexican national in a shooting across the U.S. border with Mexico. See *Digest 2017* at 172-77 for discussion of the U.S. brief filed in the Supreme Court in 2017 and the Supreme Court's 2017 decision ("*Hernandez I*"), remanding to the U.S. Court of Appeals for the Fifth Circuit in light of another Supreme Court decision in a *Bivens* action (*Ziglar v. Abbasi,* 582 U.S. ___, 137 S.Ct. 1843 (2017)*)*. See *Digest 2016* at 192 and *Digest 2015* at 163-66 for discussion of the initial decision by the Fifth Circuit, en banc, affirming the dismissal of all claims in *Hernandez v.*

Mesa et al., 785 F.3d 117 (5th Cir. 2015). On remand from the Supreme Court, the Fifth Circuit once again affirmed the district court's dismissal of all claims, focusing on the *Bivens* action. *Hernandez v. Mesa,* 885 F.3d 811 (5th Cir. 2018) (en banc). Excerpts follow from the brief of the United States as amicus, filed on September 30, 2019, arguing for the Supreme Court to affirm the dismissal and decline to extend a *Bivens* remedy to aliens injured abroad. The United States also filed a brief on April 11, 2019 at the petition stage in *Hernandez II*, which also addressed *Swartz v. Rodriguez*, No. 18-309.[**]

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C. Multiple Special Factors Counsel Hesitation Before Extending A *Bivens* Remedy To Aliens Injured Abroad

In determining whether a new context presents a "'special factor counselling hesitation,'" a court "must concentrate on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." *Abbasi*, 137 S. Ct. at 1857-1858. This Court has explained that relevant considerations include whether "Congress has designed its regulatory authority in a guarded way, making it less likely that Congress would want the Judiciary to interfere"; whether "an alternative remedial structure" is available; or whether "some other feature of [the] case," such as the implications for policymaking, the burdens of litigation and liability, or the potential for intrusion on the political branches' prerogatives, "causes a court to pause before acting without express congressional authorization." *Id.* at 1858; see *id.* at 1860-1863. If there are any "sound reasons to think Congress *might doubt* the efficacy or necessity of a damages remedy as part of the system for enforcing the law and correcting a wrong, the courts *must refrain* from creating the remedy in order to respect the role of Congress." *Id.* at 1858 (emphasis added).

Here, multiple special factors counsel hesitation. First, claims by aliens injured abroad risk judicial interference with matters that the Constitution has committed to the political branches. Second, the need for caution is reinforced by the fact that, in a variety of statutes, Congress has long taken care *not* to provide aliens injured abroad with the sort of judicial damages remedy petitioners seek. Third, the general presumption against extraterritoriality further underscores the separation-of-powers consequences of the Judiciary's acting where Congress has not.

1. Claims by aliens injured abroad implicate foreign affairs and national security

a. "The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments." *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302 (1918); see, *e.g.*, U.S. Const. Art. I, § 8, Cls. 3, 10, 11, 12, 13; Art. II, § 2. "[F]oreign affairs" is thus "a domain in which the controlling role of the political branches is both necessary and proper." *Bank Markazi* v. *Peterson*, 136 S. Ct. 1310, 1328 (2016). In recognition of the political branches' special competence and responsibility, this Court has long held that "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention." *Haig* v. *Agee*, 453 U.S. 280, 292 (1981).

[**] Editor's note: On February 25, 2020, the Supreme Court affirmed the dismissal.

This Court has made clear that *Bivens* should not be expanded to an area that the Constitution commits to the political branches. …

The same logic precludes the extension of *Bivens* to aliens injured by federal officials in foreign territory. As the Fifth Circuit explained, "the United States government is always responsible to foreign sovereigns when federal officials injure foreign citizens on foreign soil." … Judicial examination of the government's treatment of aliens outside the United States would inject the courts into sensitive matters of international diplomacy and risk "what [this] Court has called in another context 'embarrassment of our government abroad' through 'multifarious pronouncements by various departments on one question.'" *Sanchez-Espinoza* v. *Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985) (Scalia, J.) (citation omitted). Moreover, "damage remedies * * * for allegedly unconstitutional treatment of foreign subjects causing injury abroad" could carry other "foreign affairs implications"—including "the danger of foreign citizens' using the courts * * * to obstruct the foreign policy of our government." *Ibid.*

This case illustrates the inevitable foreign-affairs implications of *Bivens* suits by aliens injured abroad. The Government of Mexico has filed an amicus brief explaining (at 1, 3) that "[a]s a sovereign and independent state," it has a "vital interest in working with the United States to improve the safety and security of the border and to ensure that both countries' agents act to protect * * * the safety of the public in the border area." Issues of border security, including cross-border shootings, have been of great concern to the United States' bilateral relationship with Mexico for several years. In 2014, the two governments established a joint Border Violence Prevention Council to provide a standing forum in which to address issues of border violence. Mexico and the United States have also addressed cross-border shootings in other forums, including the U.S.-Mexico Bilateral Human Rights Dialogue. And the particular incident here has prompted bilateral exchanges, including Mexico's request that Agent Mesa be extradited to face criminal charges. … After a comprehensive DOJ investigation concluded that Agent Mesa did not violate Border Patrol policy on the use of force, the United States declined to extradite him, but it has reiterated its commitment to "work with the Mexican government within existing mechanisms and agreements to prevent future incidents." *DOJ Statement*.

Petitioners respond … that the mere presence of "a foreign *fact*" does not establish "genuine foreign affairs *concerns*." But the foreign-affairs concerns presented by these facts, far from being a "nonsensical non sequitur" … are straightforward: The injury of an alien by a federal officer in foreign territory is a matter that triggers diplomatic discussions, and the involvement of the Judicial Branch may interfere with the Executive Branch's negotiations or representations. Here, for example, the Executive has determined that Agent Mesa did *not* act improperly and has taken that position in discussions with Mexico, a position that would be undermined if a federal court entered a contrary judgment, including by bolstering Mexico's request that Agent Mesa be extradited to Mexico. The fact that the Governments of Mexico and the United States disagree over the availability of a damages remedy in this case … only underscores the foreign-affairs concerns with judicial intrusion.

More generally, petitioners suggest … that courts can mitigate foreign-affairs concerns by undertaking an ad hoc analysis of the international impact of recognizing a damages remedy in a particular case, based on their assessment of the reaction of foreign governments. The Judiciary is ill-suited to make such determinations—and attempting to make them on a case-by-case basis would itself intrude on foreign affairs. … *Abbasi* accordingly makes clear that the question whether to imply a damages remedy is not limited to its impact in a particular case. By framing the question as whether the Judiciary or Congress should consider the impact of a

damages remedy "on governmental operations systemwide," *Abbasi* acknowledged that the special-factors analysis must account for the costs and consequences of a new *class* of tort liability. 137 S. Ct. at 1858…

b. Permitting aliens injured abroad to bring *Bivens* suits against the particular set of defendants here—Border Patrol agents—also would have clear implications for national security. Just as with foreign affairs, the Constitution reserves questions of national security for the political branches. …

As the court of appeals explained, Congress has charged the Department of Homeland Security (DHS) and its components, including the U.S. Border Patrol, with "prevent[ing] terrorist attacks within the United States" and "securing the homeland." 6 U.S.C. 111(b)(1)(A) and (E) …

Petitioners contend … that this particular suit does not implicate national security and is instead akin to a matter of domestic law enforcement. That contention is both wrong and irrelevant. It is wrong because, at an appropriate level of generality, the facts alleged in petitioners' complaint do implicate border security, which Congress has linked to national security: Several individuals repeatedly crossed an international border, and a responding officer detained one suspect who had crossed the border illegally and fired a weapon across the border at another suspect. … It is irrelevant because, even if the specific facts alleged do not implicate national security, the key question is whether special factors counsel against extending *Bivens* to the relevant *class* of cases. See *Wilkie*, 551 U.S. at 550; *Stanley*, 483 U.S. at 682; *Bush*, 462 U.S. at 389. A class of cases involving aliens injured *abroad* by Border Patrol agents by definition targets border-security activities distinct from the ordinary domestic activities performed by law enforcement (including Border Patrol agents) in the United States.

2. Congress's consistent decisions not to provide a judicial damages remedy to aliens injured abroad confirm that a* Bivens *remedy is inappropriate

A variety of statutes indicate that Congress's omission of the damages remedy that plaintiffs seek was not an "oversight," confirming that it would be inappropriate for the Judiciary to create a damages remedy here when Congress has elected not to do so. *Abbasi*, 137 S. Ct. at 1862; see *Schweiker*, 487 U.S. at 423.

a. Where Congress has provided judicial damages remedies against governmental officials, it has taken care not to extend those remedies to injuries suffered by aliens abroad. Most relevant, when Congress enacted Section 1983 to provide a statutory remedy for individuals whose constitutional rights are violated by state officers, it expressly limited the remedy to "citizen[s] of the United States or other person[s] within the jurisdiction thereof." 42 U.S.C. 1983. Because *Bivens* judicially implied a federal damages action against federal officers, whereas Congress expressly created such an action against state officers in Section 1983, Congress's express limitation on the reach of Section 1983 should, *a fortiori*, limit the reach of *Bivens*. … It would turn separation-of-powers principles on their head to judicially infer liability for federal officers that Congress has expressly rejected for state officers. …

Similarly, although the FTCA waives the United States' sovereign immunity for certain injuries inflicted by federal employees generally, 28 U.S.C. 2674, Congress specifically excluded "[a]ny claim arising in a foreign country," 28 U.S.C. 2680(k). The foreign-country exception was motivated in part by Congress's "unwillingness to subject the United States to liabilities depending upon the laws of a foreign power," which would have governed FTCA claims arising abroad. *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 707 (2004) (brackets and citation omitted). But avoiding the application of foreign law was not Congress's only goal. Even before DOJ raised concerns about foreign law, the bill that became the FTCA excluded "all claims 'arising in a

foreign country *in behalf of an alien*.' " *Ibid.* (quoting H.R. 5373, 77th Cong., 1st Sess. 8 (1941)) (emphasis added). That history demonstrates that Congress's decision not to provide an FTCA remedy to *aliens* injured in foreign countries reflected adherence to the traditional practice of addressing such injuries through nonjudicial means. …

More recently, in the Torture Victim Protection Act of 1991 (TVPA), Pub. L. No. 102-256, 106 Stat. 73, Congress created a cause of action for damages against "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation," subjects another individual to "torture" or "extrajudicial killing." 28 U.S.C. 1350 note 2. "But the statute exempts U.S. officials, a point that President George H.W. Bush stressed when signing the legislation." *Meshal* v. *Higgenbotham*, 804 F.3d 417, 430 (D.C. Cir. 2015) (Kavanaugh, J., concurring), cert. denied, 137 S. Ct. 2325 (2017). "In confining the coverage of statutes such as the [FTCA] and the [TVPA], Congress has deliberately decided not to fashion a cause of action" for aliens injured abroad by federal officials. *Ibid.* Congress's repeated decisions not to provide such a remedy counsel strongly against the Judiciary's creating one.

b. When Congress *has* provided compensation for aliens injured abroad, it has done so through tailored administrative mechanisms, not by authorizing suits in federal court.

Traditionally, injuries suffered by aliens abroad were addressed through diplomatic negotiations, which could result in *ex gratia* payments to injured parties. See William R. Mullins, *The International Responsibility of a State for Torts of Its Military Forces*, 34 Mil. L. Rev. 59, 61-65 & n.22 (1966); see also, *e.g.*, Exec. Order No. 13,732, § 2(b)(ii), 81 Fed. Reg. 44,486 (July 7, 2016) (providing for *ex gratia* condolence payments to civilians injured or killed by certain uses of military force).

In certain recurring circumstances, Congress has determined that the United States' interests would be better served by establishing administrative claims procedures. …

In addition, Congress has in limited circumstances authorized specific agencies to pay claims for torts occurring abroad, including torts arising from the overseas operations of the Department of State, 22 U.S.C. 2669-1, and the Drug Enforcement Administration, 21 U.S.C. 904. In those statutes, as under the FCA, Congress provided an administrative remedy subject to careful constraints, see, *e.g.*, 10 U.S.C. 2734(b); it did not permit the injured parties to bring suit in court.

c. Petitioners contend … that congressional inaction does not qualify as a "special factor" in this case because Congress has not legislated about cross-border shootings and has infrequently legislated about the tort liability of federal officers. That assertion ignores the FTCA's foreign-country exception—which precludes liability in the precise circumstances here, as petitioners elsewhere acknowledge…—and the various alternative administrative schemes that Congress has created for injuries suffered abroad. Moreover, by artificially excluding state officers, petitioners fail to give due weight to the analogous Section 1983 regime. In combination, Congress's actions demonstrate that it has given "careful attention to conflicting policy considerations" in this arena and the system it has adopted should not "be augmented by the creation of a new judicial remedy." *Bush*, 462 U.S. at 388; see *Schweiker*, 487 U.S. at 423.

3. The presumption against extraterritoriality reinforces the inappropriateness of extending* Bivens *to aliens injured abroad

a. The presumption against extraterritoriality further confirms that *Bivens* should not be extended to aliens injured abroad. It is a basic principle of our legal system that, in general, "United States law governs domestically but does not rule the world." *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U.S. 108, 115 (2013) (citation omitted). In statutory interpretation, that

presumption is reflected in the canon that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." *Morrison* v. *National Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010). That canon "helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches." *Kiobel*, 569 U.S. at 116.

This Court has made clear that "the principles underlying the canon of interpretation similarly constrain courts" in recognizing common-law causes of action. *Kiobel*, 569 U.S. at 116. Indeed, the Court explained in *Kiobel* that "the danger of unwarranted judicial interference in the conduct of foreign policy is *magnified* in the context of the ATS, because the question is not what Congress has done, but instead what courts may do." *Ibid.* (emphasis added). That danger is still greater in the *Bivens* context, where courts are asked to create a cause of action without even the minimal congressional guidance found in the ATS.

After *Kiobel*, the Court clarified that the presumption against extraterritoriality "separately appl[ies]" to a private damages remedy for injuries suffered abroad, even if the underlying substantive rule has extraterritorial reach. *RJR Nabisco, Inc.* v. *European Cmty.*, 136 S. Ct. 2090, 2106 (2016); see *id.* at 2106-2108. In *RJR Nabisco*, the Court thus concluded that a statutory private right of action did not reach injuries suffered abroad—even injuries caused by domestic conduct, see *id.* at 2105—because the statute did not "provide a clear indication that Congress intended to create a private right of action for injuries suffered outside of the United States," *id.* at 2108. Under that reasoning, even if Congress had enacted a statute expressly providing a damages remedy for individuals whose constitutional rights are violated by federal officers, this Court would not extend that statutory remedy to this case absent a "clear indication" that Congress intended to reach "injuries suffered outside of the United States." *Ibid.* And it would be "grossly anomalous * * * to apply *Bivens* extraterritorially when [courts] would not apply an identical statutory cause of action for constitutional torts extraterritorially." *Meshal*, 804 F.3d at 430 (Kavanaugh, J., concurring).

b. Petitioners respond … that the presumption against extraterritoriality should not apply because extending *Bivens* will not cause international discord in this case. But the presumption applies "across the board, regardless of whether there is a risk of conflict" with other nations in a particular case, as confirmed by the fact that the European Community was itself the plaintiff in *RJR Nabisco*. 136 S. Ct. at 2100 (citation and internal quotation marks omitted).

Petitioners next assert that the presumption does not apply to constitutional claims because "th[e] Court is not acting as the agent of the legislature" when it interprets the Constitution, unlike when it interprets statutes. But in determining whether to extend a damages remedy for a constitutional violation, the Court is indeed attempting to ascertain "the likely or probable intent of Congress." *Abbasi*, 137 S. Ct. at 1862. As *Abbasi* explained, the touchstone of the Court's analysis is thus whether "*Congress* might doubt the efficacy or necessity of a damages remedy." *Id.* at 1858 (emphasis added).

Finally, petitioners for the first time contend that the presumption has been rebutted here because Agent Mesa's conduct sufficiently "touche[s] and concern[s]" the United States. … (quoting *Kiobel*, 569 U.S. at 124-125). Even if the Court considers that new argument, *RJR Nabisco* establishes that when a cause of action focuses on a plaintiff 's injury, the presumption applies to claims that "rest entirely on injury suffered abroad." 136 S. Ct. at 2111; see *id.* at 2105-2107. And more generally, a "touch and concern" analysis would require a case-specific inquiry into whether a particular defendant's conduct sufficiently involved the United States.

That sort of inquiry is incompatible with the categorical question whether this Court should extend a non-statutory remedy to the class of potential claims brought by aliens injured abroad.

* * * *

2. *Swartz v. Rodriguez*

Rodriguez v. Swartz involves issues similar to those in *Hernandez*. However, unlike the Fifth Circuit in *Hernandez*, the Ninth Circuit found, *inter alia*, that there was an implied remedy for damages under *Bivens* in the context of a cross-border shooting. *Rodriguez v. Swartz*, 899 F.3d 719 (2018). See *Digest 2016* at 192 for discussion of the U.S. government's notification to the Ninth Circuit that it should use the Supreme Court's determination in *Hernandez* in deciding *Rodriguez*. See *Digest 2017* at 177-81 for discussion of the U.S. supplemental brief filed in 2017 in the Ninth Circuit supporting reversal. After the Ninth Circuit's decision in 2018, the defendant in the district court filed a petition for writ of certiorari in the U.S. Supreme Court. On October 29, 2018, the Supreme Court invited the U.S. government to file a brief expressing its views. *Swartz v. Rodriguez*, No. 18-309. The U.S. brief filed on April 11, 2019 in both *Hernandez* and *Swartz* recommends that the Court address the question of extending a *Bivens* remedy in the *Hernandez* case and hold the *Swartz* case, pending the decision in *Hernandez*.

E. RENEGOTIATING COMPACTS OF FREE ASSOCIATION

On May 21, 2019, the White House issued a Joint Statement from the President of the United States and the Presidents of the Freely Associated States (the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau) after their meeting. The joint statement is available at https://www.whitehouse.gov/briefings-statements/joint-statement-president-united-states-presidents-freely-associated-states/. On July 23, 2019, Deputy Assistant Secretary of State Sandra Oudkirk provided a statement to Congress on the Freely Associated States, which is available at https://www.energy.senate.gov/public/index.cfm/files/serve?File_id=8DC6AFF6-45DD-43FA-A734-7C4CF3165D51.

On August 5, 2019, government leaders from the United States and the Freely Associated States provided a joint press conference to share the outcome of bilateral meetings. The remarks of the leaders are available at https://www.state.gov/secretary-of-state-michael-r-pompeo-federated-states-of-micronesia-president-david-w-panuelo-republic-of-the-marshall-islands-president-hilda-c-heine-and-republic-of-palau-vice-president-and-min/. At the press conference, Secretary of State Michael R. Pompeo announced that the United States had begun renegotiations to extend compacts of free association with each of these three countries.

On September 26, 2019, Deputy Assistant Secretary Oudkirk provided a further statement to Congress, available at

http://docs.house.gov/meetings/FA/FA00/20190926/110046/HHRG-116-FA00-Wstate-OudkirkS-20190926.pdf, and excerpted below.

> On August 5, during the first visit by a Secretary of State to the Federated States of Micronesia, Secretary Pompeo announced that the United States has begun consultations on certain provisions of our respective Compacts of Free Association with each country.
>
> We are already coordinating closely across the interagency to evaluate a range of options to promote our continued relationships with all three countries. These agreements are complex and require a thoughtful approach with extensive consultations to make sure that we get them right. An interagency group will travel to each of the Freely Associated States in October to better understand the needs of each of the three countries.
>
> We welcome the opportunity to work with Congress to secure long-term U.S. strategic interests in this vital region. We are committed to working collaboratively to explore ways in which we might further strengthen these relationships after the economic assistance the United States currently provides expires under the current terms of the three Compacts of Free Association.

Cross References

Case regarding extraterritoriality of U.S. IP law, **Ch. 11.F.5.e.**